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IN THE

Supreme Court of the United States

October Term, 1982

WHEELING-PITTSBURGH STEEL CORPORATION, a corporation,

Petitioner,

vs.

SECRETARY OF LABOR,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

PETITION FOR A WRIT OF CERTIORARI

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Questions Presented for Review

I. The general duty clause of the Occupational Safety and Health Act broadly condemns "recognized hazards . . . likely to cause death or serious physical harm." The courts have uniformly compensated for this otherwise unconstitutional vagueness by applying the objective standard of a reasonable person familiar with conditions in the industry.

1. Did the Court of Appeals, in approving the complete failure of the Review Commission to apply the required objective standard of conduct to this case deprive petitioner of the protection afforded it by the due process clause of the constitution?

2. Did the Court thereby render a decision in conflict with the decisions of other federal courts of appeals?

3. Did the Court thereby so far depart or sanction such a departure by the Commission from the accepted or usual course of judicial proceedings as to call for an exercise of this Court's power of supervision?

II. 1. Did the Court of Appeals, in approving the Commission's failure to explain its departure from the administrative law judge's factual findings herein render a decision in conflict with the decisions of other federal courts of appeals?

2. Did the Court thereby so far depart or sanction such a departure by the Commission from the accepted or usual course of judicial proceedings as to call for an exercise of this Court's power of supervision?

List of all Parties

Wheeling-Pittsburgh Steel Corporation[1]

Secretary of Labor,
United States Department of Labor

Occupational Safety and Health
Review Commission

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[1] Petitioner, Wheeling-Pittsburgh, in compliance with Rules of the Supreme Court of the United States, Rule 28.1, states that it has no parent or affiliate corporation, and lists the following as subsidiaries:

Consumers Mining Company
W-P Coal Company
Fort Duquesne Coal Company
Gateway Coal Company
Harmar Coal Company
Mingo Oxygen Company
Monessen Southwestern Railway Company
Pittsburgh-Canfield Corporation
Three Rivers Coal Company
Wheeling-Gateway Coal Company
Wheeling-Itasca Company
Wheeling-Pittsburgh Trading Company
Wheeling-Minmetals International, Inc.

TABLE OF CONTENTS.

	Page
Questions Presented for Review	i
List of all Parties	ii
Table of Contents	iii
Table of Authorities	iv
Reports of Opinions Below	1
Grounds on Which Jurisdiction in this Court is Invoked	2
Constitutional Provisions, Statutes and Regulations	2
Statement of the Case	2
Procedural Posture	2
Facts	4
Argument	8
I. The Court of Appeals Improperly Approved the Commission's Total Failure to Apply the Required Objective Standard of Conduct Under the General Duty Clause	8
II. The Court of Appeals Sanctioned the Commission's Failure to Explain Its Summary Rejection of the Administrative Law Judge's Findings	15
Conclusion	19

Page

TABLE OF AUTHORITIES.

CASES:

ABC Trans-National Transport, Inc. v. NLRB, 642 F.2d 675 (3d Cir. 1981) 17
American Airlines, Inc. v. Secretary of Labor, 578 F.2d 38 (2d Cir. 1978) 8,9,11,12
Brennan v. Giles & Cotting, Inc., 504 F.2d 1255 (4th Cir. 1974) 15,17,19
Brennan v. OSHRC, 502 F.2d 946 (3d Cir. 1974) ... 10,16
Champion Petroleum Co. v. OSHRC, 593 F.2d 637 (5th Cir. 1979) 10
Magma Copper Co. v. Marshall, 608 F.2d 373 (9th Cir. 1979) 8,9,14
Marshall v. C.F. & I. Steel Corp., 576 F.2d 809 (10th Cir. 1978) 16
NLRB v. Majestic Weaving Co., Inc., 355 F.2d 854 (2d Cir. 1966) 12,17
NLRB v. Walton Manufacturing Co., 369 U.S. 404 (1962) 17
Penasquitos Village, Inc. v. NLRB, 565 F.2d 1074 (9th Cir. 1977) 17
Secretary of Labor v. Inland Steel Company, OSHRC Docket No. 79-3286 14
Universal Camera Corp. v. NLRB, 340 U.S. 474 (1951) 16
Voegele Co. v. OSHRC, 625 F.2d 1075 (3d Cir. 1980) 8,9,10

Page

STATUTES:

Occupational Safety and Health Act of 1970:
29 U.S.C. §660 2
29 U.S.C. §660(a) 2,16
29 U.S.C. §654 2
29 U.S.C. §654(a) 2
29 U.S.C. §654(a)(1) 8

RULES:

Rules of the Supreme Court of the United States, Rule 28.1 ii

REGULATIONS:

Code of Federal Regulations, 29 C.F.R. §2200.73 2,10

CONSTITUTION:

United States Constitution, Amend. V 2

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PETITION FOR A WRIT OF CERTIORARI

Reports of Opinions Below

The Court of Appeals for the Third Circuit issued no reported opinion in this matter, but instead entered a judgment order (1a).[2]

The Administrative Law Judge and the Occupational Safety & Health Review Commission each issued opinions, as follows, both of which are unreported:

> Decision and Order of Judge Henry K. Osterman, OSHRC OSHRC Docket Nos. 76-4807 and 76-4808 (consolidated) Dated August 9, 1977 (3a).
>
> Commission Decision, Dated November 24, 1981 OSHRC Docket Nos. 76-4807 and 76-4808 (consolidated) (10a).

[2] Citations are to Appendix filed separately herewith.

Grounds on Which Jurisdiction in this Court is Invoked

A Judgment Order of the United States Court of Appeals for the Third Circuit was entered on July 28, 1982.

The Order denying Wheeling-Pittsburgh's Petition for Rehearing was entered on August 24, 1982.

Jursidiction in this Court is predicated upon 28 U.S.C. §1254(1).

Constitutional Provisions, Statutes and Regulations

The constitutional provisions, statutes and regulations involved herein are the due process clause of the Fifth Amendment to the United States Constitution, U.S. CONST. Amend. V; the Occupational Safety and Health Act of 1970, 29 U.S.C. §§654, 660 (1970); and 29 C.F.R. §2200.73. Pertinent portions of these provisions are set forth at Appendix F hereto.

Statement of the Case

Procedural Posture

This case was filed in the Court of Appeals for the Third Circuit as a petition for review of an order by the Occupational Safety & Health Review Commission, whereby petitioner, Wheeling-Pittsburgh Steel Corporation, was found to have violated 29 U.S.C. §654(a), the "general duty clause" of the Occupational Safety and Health Act of 1970 (OSHA). Federal jurisdiction in the Third Circuit Court of Appeals was based upon 29 U.S.C. §660 (a), in that the petitioner, whose principal office is located at Pittsburgh, Pennsylvania, within the Third Circuit, sought review of a final order of the Commission.

The Commission order in question overturned a decision and order entered more than four and a half years previously by Administrative Law Judge, Henry K. Osterman, which had vacated the citations. The Commission decision held that the ALJ had applied an incorrect definition of "recognized hazard." (19a-22a). Having reached that conclusion, the Commission cursorily reviewed the other elements of a general duty violation and reversed the ALJ. The Commission gave no explanation of its rejection of the ALJ's factual findings. Nor, in reaching its conclusion, did the Commission apply at all the objective standard required to define and narrow the scope of the general duty clause.

The employer filed its petition for review with the Third Circuit, which denied its petition by judgment order and without oral argument. In lending rubberstamp approval to the Commission's failure to apply any objective standard to petitioner's conduct, the circuit court deprived the petitioner of the protection afforded by the due process clause of the Constitution. In this regard, the circuit court ruling also conflicts with the decisions of other circuits and so far departs from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision.

The circuit court's ruling also fails to require the commission to provide a reason for its departure from the ALJ's factual conclusions. This failure also conflicts with decisions of other circuits and so far departs from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision.

Because the challenged practice has proven safe and has never resulted in an injury to an employee, and would be extremely expensive to alter, the issue is of

vital importance to this employer is a depressed industry. Because of the disposition of this matter totally without reference to any objective standard, the question or required notice in general duty clause cases in the Third Circuit is also left in doubt, to the detriment of all employers subject to OSHA, as well as the petitioner.

Facts

The employer is a manufacturer of basic steel products. It operates two steel-making facilities that are the subject of the citations presented for review herein. These facilities are the South Works, at Mingo Junction, Ohio, and the North Works, at Steubenville, Ohio (some four miles distant). At these facilities, the employer owns, maintains and operates an inter-plant railroad system (73a-74a).

During the period between October 4 and October 8, 1976, the subject facilities were inspected by a compliance safety and health officer. Following the inspection, two substantially identical citations were issued as set forth below:

> Public Law 91-596 Section 5(a)(1): The employer did not furnish to each of his employees employment and a place of employment which are free from recognized hazards that are causing or are likely to cause death or serious physical harm to his employees.
>
> a) Brakes on bottles that transport molten metal were not set when they are spotted.
>
> b) Brakes on bottles that transport molten metal were not maintained to assure correct functioning. . . .

(97a).

The "bottles referred to in the citations are also known as hot metal transfer cars, and both terms are used interchangeably. These cars are used to transport hot, molten iron from the blast furnaces to the basic oxygen furnace (BOF), where it is mixed with other raw materials and converted into steel (73a-75a).

A bottle is approximately 33 feet long. It is shaped like a torpedo, about 11 feet high in the center and tapering down at either end. The car contains an opening in the top, through which the molten iron is loaded and unloaded. An individual car weighs roughly 125 tons empty and up to about 325 tons loaded (15a).

The bottles are moved back and forth between the blast furnaces and BOF by means of a diesel-powered locomotive. A train crew, normally consisting of an engineer, brakeman and conductor, is assigned to the task of transporting the cars (74a-75a).

"Spotting," referred to in the citations, occurs when the cars are placed beneath a spout leading down from the blast furnace to receive molten metal. The employer's long-standing practice has been to fix cars in position for spotting by blocking the wheels with tapered wooden blocks known as "chocks" (87a). This job is performed by the two groundmen on the train crew, the brakeman and the conductor (78a). After the car is secured in place, the locomotive uncouples and pulls away, returning when the car has been filled, to hook up again and pull it away.

The dispute in this case centers around the use of chocks instead of mechanical brakes. The employer has chosen to rely on chocking instead of mechanical braking because chocking is considered to be the safest and most feasible method of stabilizing the cars (81a, *et seq.*).

Chocking is the method of choice in other steel companies, as well (84a-85a). It is undisputed that there have been no resulting accidents or injuries in the many years the employer has followed this procedure at the two plants (75a-76a, 83a).

The mechanical brakes in question are not air brakes. They are hand brakes, set by turning a wheel at either end of the car (81a-83a).

On a conventional railroad car, these are trucks (each consisting of two parts of wheels) under each end of the car. The brake on one truck is connected by mechanical leverage to the brake on the other truck. A bottle car, on the other hand, has double trucks under each end or a total of sixteen wheels. There is no physical connection whatsoever between the brake on one set of trucks to those located at the opposite end of the car. On cars of this massive weight, the hand-braking system is of limited utility, at best (81a-83a). There is record testimony that a single brake would be inadequate to hold the car (82a-83a).

The chocking consists of placing a soft wooden block behind one wheel of the car at rest. If the car moves, it rides slightly up onto the wedge and crushes into it, anchoring the chock securely between the wheel and the rail. This creates an incline that the car would have to surmount in order to move off spot (81a-82a).

The bottles are used exclusively at the two subject plants, an essentially level location next to a river (85a-86a). Under these conditions, the employer considers chocking to be both more effective and safer than hand-braking. Other steel companies in the industry also rely on chocking rather than hand-braking (84a-85a).

Considerable testimony was introduced at the hearing to show the hazards associated with hand-braking as opposed to chocking. The most significant hazard relative to the present discussion was that of close clearance.

In the iron alleys, where the cars are loaded, there is very narrow clearance. At Mingo, only one brake, the outside brake, would be accessible to the brakeman. Therefore, the car would be braked only at one end. At Steubenville, *neither* brake would be accessible because of close clearance on both sides. If an employee had to set or release the less accessible brake, he would have to reach into a hazardous position to do so because of the narrow clearance. Moreover, the employee would not be visible to the engineer operating the locomotive, as he would be if chocking (87a-89a).

This problem was essentially conceded by the Secretary's witnesses, including the compliance officer. The Commission, in fact, affirmed so much of the administrative law judge's decision as vacated the citation in close-clearance situations (24a). In other words, brakes need not be set *at all* while spotting at the North Works (Steubenville) and only the outside brake at the South Works (Mingo). Record testimony indicates that a single brake is not adequate to hold a car (82a-83a).

In the employer's long history of using chocks instead of brakes, there have been no resultant accidents or injuries. Yet the employer is told to bear the expense of providing and maintaining handbrakes for use in the extremely limited circumstances described above, and in a situation of limited utility, at best.

ARGUMENT

I. The Court of Appeals Improperly Approved the Commission's Total Failure to Apply the Required Objective Standard of Conduct Under the General Duty Clause.

The general duty clause of the Occupational Safety and Health Act requires each employer to furnish his employees with "employment and a place of employment . . .free of recognized hazards . . . likely to cause death or serious physical harm." 29 U.S.C. §654(a)(1). Unlike the myriad very specific regulations promulgated under the Act, the general duty clause offers the employer no advance notice of what conduct will be held to constitute a violation.

Because the OSHA general duty clause is broad and undefined, reference to an objective standard is essential in its application. Unless such a standard is applied, the general duty clause does not comport with constitutional requirements of fair notice. *Magma Copper Co. v. Marshall*, 608 F.2d 373, 376-77 (9th Cir. 1979).

In 1980, the Third Circuit adopted the prevailing objective standard in *Voegele Co. v. OSHRC*, 625 F.2d 1075, 1078 (3d Cir. 1980). The *Voegele* court quoted approvingly therein from the standard applied in *American Airlines, Inc. v. Secretary of Labor*, 578 F.2d 38, 41 (2d Cir. 1978), as follows: "Whether a reasonable [person] familiar with [the] conditions in the . . . industry would have instituted . . . more elaborate . . . precautions?"

In the instant case, the employer has utilized the chocking procedure for many years, with a perfect record of safety. Other employers in the industry have chosen to chock rather than to use hand brakes. No specific OSHA regulation prohibits chocking or requires hand

brakes. And yet the employer is held to have violated the law in failing to utilize hand brakes.

This matter initially was heard by Administrative Law Judge Henry K. Osterman. The judge held that the Secretary had established no violation, and accordingly vacated the citations.

Wholly without reference to the required objective standard, the Review Commission reversed. On petition for review, the Third Circuit Court of Appeals declined to hear oral argument and summarily approved the Commission decision by Judgment Order, stating that "the Commission's findings of fact are supported by substantial evidence and it applied the correct legal standards" (2a).

The application of the general duty clause in this case without reference to an objective standard impermissibly extends the scope of that extremely broad and vague statutory provision. The Court thereby deprives petitioner of the protection of the due process clause of the Constitution. In so doing, the court has so far departed from the accepted and usual course of judicial proceedings, and so far sanctioned such a departure by the Commission, as to call for an exercise of this Court's supervisory powers. The Court of Appeals decision also directly conflicts with its own establishment of an objective standard in *Voegele Co. v. OSHRC*, 625 F.2d 1075, 1078 (3d Cir. 1980), as well as with the decisions of other courts, including *Magma Copper Co. v. Marshall*, 608 F.2d 373, 367-77 (9th Cir. 1979); *American Airlines, Inc. v. Secretary of Labor*, 578 F.2d 38, 41 (2d Cir. 1978).

The elements of a general duty clause violation are well-established.

1) existence of a recognized hazard;

2) likely to cause death or serious injury;

3) failure to render the workplace free of the hazard;

4) existence of a feasible means of abatement.

Champion Petroleum Co. v. OSHRC, 593 F.2d 637, 640 (5th Cir. 1979).

The Secretary has the burden of proof as to each of the above elements. 29 C.F.R. §2200.73. "Since the general duty clause is so broad, the evidence to support a charge of violation should be specific and detailed." *Brennan v. OSHRC*, 502 F.2d 946, 952-53 (3d Cir. 1974).

In determining elements 3 and 4 above, *i.e.*, whether the employer has failed to render the workplace free of the hazard, and whether a feasible means of abatement exists, the prevailing objective standard of conduct requires the Commission and the Courts to focus on the employer's practices. The question, as to these two critical elements, must be whether the reasonable person, familiar with conditions in the industry, would have instituted more elaborate precautions. *Voegele, supra*, 625 F.2d at 1078.

This was not done in the instant case. Because of the Commission's disagreement with the parties and administrative law judge regarding definition of the first element, "recognized hazard," this element received virtually all of the Commission's attention. The Commission not only failed to apply the objective standard to elements 3 and 4, it did not even allude to it.

The Commission's entire discussion of whether more elaborate precautions should have been instituted consists of conclusory statements that: (a) petitioner's use of chocks does not free the workplace of the hazard and (b) the Secretary "has met his burden of establishing the feasibility and likely utility of setting brakes in most situations." (23a-24a).

A Second Circuit case, *American Airlines, Inc. v. Secretary of Labor*, 578 F.2d 38 (2d Cir. 1978), is instructive with regard to correct application of the objective standard. In that case, American simply required its cargo handlers to wear "sturdy work shoes," and instructed its workers in the safe handling of cargo. *Id.* at 40.

American argued that, without application of an objective standard, the regulation was unconstitutionally vague. "It also claimed that the safety measures then in effect were all that a reasonably prudent man, conversant with the circumstances of the industry, would require." *Id.*

The Second Circuit held as follows:

> Although it is well-established that our powers to review the substantive determinations of agencies are limited, . . . it is within the scope of our oversight responsibilities to ascertain whether the Commission applied the correct legal standard . . . . We conclude that it did not."

Id. at 41.

In the *American Airlines* case as in the instant case, the Commission had concentrated on the "recognized hazard" element to the exclusion of the other essential elements of a general duty violation. The court found er-

ror in the Commission's narrow focus on "merely whether 'a reasonable person would be appraised [sic] of a hazard to feet' in the American facility." *Id.* Rather, the proper concern is "whether a reasonable man familiar with conditions in the airline industry would have instituted protective measures more elaborate than the precautions taken by American . . . ." *Id.*

"[S]ince an administrative agency 'has the ability to make new law prospectively through the exercise of its rule-making powers, it has less reason [than a court] to rely upon *ad hoc* adjudication to formulate new standards of conduct.' " *NLRB v. Majestic Weaving Co., Inc.* 355 F.2d 854, 860 (2d Cir. 1966).

As in the *American Airlines* case, the Commission here focussed narrowly on the existence of a hazard. It did not address what "the reasonable man familiar with conditions in the . . . industry" would have done. In these circumstances, the general duty clause becomes a purely subjective tool. It means only whatever the Secretary thinks it means, requiring employers to guess without guidance.

Failure to apply the required objective standard in this case has placed the employer in an impossible compliance situation. The decision also creates a quagmire for other employers in the industry who rely on chocking instead of hand-braking.

The subject citations charge only two violations: 1) failure to set brakes when the bottles are "spotted," and 2) failure to maintain brakes on the bottles (97a, 99a). "Spotting," as described above, occurs in the iron alleys when the cars are placed beneath spouts leading from the blast furnaces, in order to receive molten metal (15a).

At the evidentiary hearing before the administrative law judge herein, the employer presented evidence that in the areas where the cars are spotted, clearance is extremely narrow. This creates a hazardous situation for an employee attempting to set a brake because at Mingo only one brake is accessible, and at Steubenville *neither* is accessible. This problem was admitted by the Secretary's witnesses. The Commission, in fact, affirmed that portion of the law judge's decision which vacated the citation in close clearance situations (24a).

Under the circumstances, the employer is put to the expense of maintaining brakes for extremely limited use, in largely undefined circumstances. The citations themselves relate only to "spotting" in the iron alleys. Under the Commission order, neither brake need be set during spotting at the Steubenville iron alley and only one brake at Mingo.

The Compliance Officer stated that "it would depend on various conditions in the area whether it would be more safe or unsafe to use the brake . . . . [I]t is strictly a judgment factor." (76a-77a). Nevertheless, the Commission order decrees that brakes be set in "those situations in which one or both brakes can safely be set." The citations are vacated "for those situations in which it is too hazardous to set any brake." (24a).

The employer thus is told to bear the expense of maintaining the brakes, but not told when they must be applied. The resultant quandary for the employer is a direct result of the failure of the Commission and Court of Appeals to place this factual setting in an objective framework of "the reasonable man" in the relevant industry.

In the very recent case of *Secretary of Labor v. Inland Steel Company*, OSHRC Docket No. 79-3286, Administrative Law Judge Richard DeBenedetto considered the issue of hand brakes versus chocks. In an opinion, dated April 7, 1982, Judge DeBenedetto reached the same conclusion as did Judge Osterman in the instant case, *i.e.*, hand brakes are not required by the general duty clause. (Opinion set forth at Appendix D, 29a).

Unlike the Review Commission in the instant case, Judge DeBenedetto correctly applied the requisite objective standard " 'of a reasonably conscientious safety expert familiar with the pertinent industry.' " Opinion of Judge DeBenedetto (hereinafter "Opinion," at 57a), quoting from *Magma Copper Co. v. Marshall*, 608 F.2d 373, 377 (9th Cir. 1979).

Judge DeBenedetto reviewed much case law involving hand brake usage over the years, noting that "[o]ne of the primary objects of the Safety Appliance Act was the protection of railroad employees from the dangers incurred in manipulating handbrakes." (Opinion, at 59a). "Contrarywise, the Secretary has failed to show by any competent evidence that the use of blocks has been the cause of injury to Inland employees." (Opinion, at 61a-62a). Similarly, of course, there is a lengthy injury-free history in the instant case.

As in the instant case, Judge DeBenedetto noted that "[t]he Secretary failed to address the question of handbrake maintenance, a vital aspect of the case." (Opinion, at 64a). Judge DeBenedetto noted that "[t]his added to the existing car-maintenance problems may very well be an insurmountable task, which Inland obviously took into account when it chose to use the tapered wooden block as a substitute for hand brakes . . . ." *Id.*

Therefore, "[t]here is still another reason why the Secretary's case must fail and that is the failure to prove economic feasibility." *Id.* at 64a.

Had the Commission or the reviewing court applied the requisite objective standard to the instant case, as did Judge DeBenedetto, the employer herein would not be left to bear the great expense of maintaining brakes for extremely limited use in undetermined circumstances. Nor would the employer be left to guess at its peril as to the scope of its responsibility under the general duty clause.

II. The Court of Appeals Sanctioned the Commission's Failure to Explain Its Summary Rejection of the Administrative Law Judge's Findings.

Responsibility for determining whether the Secretary's burden of proof has been met rests initially with the Administrative Law Judge, who here found that the Secretary had failed to prove his case, particularly with regard to safety practices in other steel companies. The Commission's decision, reversing the judge, failed to explain its summary rejection of the judge's findings.

The Third Circuit Court of Appeals affirmed the Commission decision herein by judgment order. In so doing, the appellate court rendered a decision in conflict with the decision in *Brennan v. Giles & Cotting, Inc.*, 504 F.2d 1255 (4th Cir. 1974), which requires the Commission to explain any departure from the ALJ's factual findings. The Commission decision and affirming Third Circuit judgment order in this regard also so far depart from the accepted and usual course of judicial proceedings as to call for the exercise of this Court's power of supervision.

The Commission's decision is subject to judicial review and may be set aside if unsupported by "substantial evidence." 29 U.S.C. §660(a). In making its determination on the question of substantiality, the reviewing court "must examine the record as a whole, including the decision of the Administrative Law Judge." *Marshall v. C.F. & I. Steel Corp.*, 576 F.2d 809 (10th Cir. 1978). This duty is specifically embodied in the language of the statute. 29 U.S.C. §660(a).

This Court, in addressing the weight to be accorded to the Administrative Law Judge's findings in an NLRB case, stated:

> The "substantial evidence" standard is not modified in any way when the Board and its examiner disagree. We intend only to recognize that evidence supporting a conclusion may be less substantial when an impartial, experienced examiner who has observed the witnesses and lived with the case has drawn conclusions different from the Board's than when he has reached the same conclusion.

Universal Camera Corp. v. NLRB, 340 U.S. 474, 495 (1951). The same standard of review applies to Occupational Safety and Health (OSHA) cases, as well. See, *e.g.*, Brennan, *supra*, 502 F.2d at 950.

The Ninth Circuit has stated:

> "[T]he Board's supporting evidence, in cases where it rejects the examiner's findings, must be stronger than would be required in cases where the findings are accepted, since in the former cases the supporting evidence must be deemed substantial when measured against the examiner's contrary findings as well as the opposing evidence." [citation omitted].

Penasquitos Village, Inc. v. NLRB, 565 F.2d 1074, 1078 (9th Cir. 1977). "[T]he probative weight which may be properly given to testimony is severely reduced" where the administrative law judge has accepted opposing evidence. *Id.* at 1077.

A recent Third Circuit opinion explains the rationale behind according deference to the law judge's findings, quoting this Court:

> Weight is given the ALJ's determinations of credibility because he or she "sees the witnesses and hears them testify, while the Board and the reviewing court look only at cold records."

ABC Trans-National Transport, Inc. v. NLRB, 642 F.2d 675 (3d Cir. 1981), quoting from *NLRB v. Walton Manufacturing Co.*, 369 U.S. 404, 408 (1962).

It has been stated that the Commission will generally consider the ALJ's credibility determinations to be controlling. *P & Z Co.*, OSHRC Docket No. 76-431, 1977-78 CCH OSHD, ¶22413, 6 BNA OSHC 1189. It has also been noted that although the hearing officer's finding attains its maximum weight on matters of credibility, it is also valuable on other matters where "observation of the witnesses is likely to give a more accurate feel than reading a cold record ...." *NLRB v. Majestic Weaving Co.*, 355 F.2d 854 (2d Cir. 1966).

There are obvious inherent difficulties when the Commission overturns an ALJ's factual findings. Therefore, where the law judge's disposition of the case is rejected, the Commission is bound to explain why. *Brennan v. Giles & Cotting, Inc.*, 504 F.2d 1255 (4th Cir. 1974).

It would be difficult to imagine a "colder" record than that before the Commission in this case. The citations

were issued on October 29, 1976, charging W-P with failure to use or maintain brakes on its bottle cars. Testimony was taken before the Administrative Law Judge on March 16, 1977. Judge Osterman ruled on August 9, 1977, vacating the citations. He held that although there was "contradictory evidence" in the record, the Secretary had failed to carry his by a preponderance of the evidence (7a-8a).

More than four years later, the Commission ruled, reversing Judge Osterman's decision, with one limited exception. Despite the conflicting evidence in the record, the Commission chose to reject the trial judge's factual findings and substitute its own. The Commission did not offer any reasoned explanation for this departure, as it was required to do. The Third Circuit summarily affirmed, thereby sanctioning the Commission's failure to explain its rejection of the law judge's fresher factual conclusions.

Specifically, the law judge's most critical factual finding was rejected by the Commission without any explanation or discussion whatsoever. Not surprisingly, this rejected finding is directly relevant in applying the objective standard of the reasonable man familiar with conditions in the industry, which the Commission also ignored.

The trial judge's critical finding held the Secretary's evidence of usual practice in the steel industry to be inadequate, noting "the Secretary's failure to produce convincing evidence of the practice employed in other steel mills." (7a). This finding was ignored by the Commission opinion, which merely noted by way of footnote, "Other steel employers use hand brakes." (23a) this Third Circuit affirmed the Commission by judgment order.

The Commission is not required to accept an administrative law judge's findings of fact. It *is* required, however, to state its reason for rejecting the judge's findings. *Brennan v. Giles & Cotting, Inc.*, 504 F.2d 1255, 1264 (4th Cir. 1974).

The Commission's failure to state its reasons for rejecting Judge Osterman's most critical factual conclusion is obvious legal error. To have done so more than four years after the judge's decision, on the basis of a cold record containing substantial evidence to support the judge's view, is impermissible. In so doing, the Commission and the court of appeals, which sanctioned the error, so far departed from the accepted and usual course of judicial proceedings as to call for the exercise of this Court's power of supervision. The decision also conflicts with that of the Ninth Circuit in *Brennan v. Giles & Cotting, Inc.*, 504 F.2d 1255, 1264 (4th Cir. 1974). For these reasons, the case merits this Court's review.

Conclusion

For the foregoing reasons, and in light of the critical importance of this general duty clause case not only to the instant litigants, but also to all other employers subject to the Occupational Safety and Health Act, petitioner Wheeling-Pittsburgh Steel Corporation requests this Court to grant a writ of certiorari to review the decision of the Third Circuit Court of Appeals herein.

Respectfully submitted,

DAVID J. ARMSTRONG
Counsel for Petitioner,
Wheeling-Pittsburgh Steel
Corporation

Dated: